

MINUTES  
FOR THE MEETING OF THE  
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: May 22, 2002  
TIME: 9:00 am  
PLACE: DLNR Board Room  
Kalanimoku Bldg.

Chairperson Gilbert S. Coloma-Agaran called the meeting of the Commission on Water Resource Management to order at 9:16 a.m.

The following were in attendance:

**MEMBERS:** Mr. Gilbert S. Coloma-Agaran, Dr. Bruce Anderson, Ms. Meredith Ching, Mr. Clayton Dela Cruz, Mr. Brian Nishida, Mr. Herbert Richards, Jr.

**STAFF:** Linnel Nishioka, Roy Hardy, Ed Sakoda, Dean Nakano, Lenore Nakama, Charley Ice, David Higa, Kevin Gooding

**COUNSEL:** Linda Chow, Esq.

**OTHERS:** Council member Steve Holmes, George Hudes, Fred Madlener, Kapua Sproat, Brad Finney, Charlie Reppun, Kaia Hoe, Amy Luerson, Danny Bishop, Kawai Hoe, Liko Hoe, Christine Daleida, Junie Hayashi, Ben Kudo, Tom Nance, Roy Abe, Paul Reppun, Calvin Hoe, Don Cooke, Tom Young, John Reppun, Ilima Morrison, Alikia Lambert, Dawn Farm-Ramsey, Reid Yamashiro, Keola Nakanishi, Harold Edwards, Vince Dodge, Kat Brady, Sharla Manley, Guy Nakamoto, Cha Smith, Kahi Kahaku, James Muratsuchi, Dan Lum, Alonzo-Greer Ohara, Kanoe Lalawai-Cruz, 'Ai Pohaku students from Waianae Intermediate School, Laura Mau, Lloyd Yamachika, Alfredo Lee

All written testimonies submitted at the meeting are filed in the Commission office and are available for review by interested parties. The items were not taken in the order posted on the agenda.

**1. Minutes of the April 17, 2002 meeting**

MOTION: (DELA CRUZ/RICHARDS)

To approve the minutes.

UNANIMOUSLY APPROVED.

**2. Old Business/Announcements by Deputy Director Linnel Nishioka**

The Department of Agriculture (DOA) informed the Commission that the diversion at Hakalaoa was removed.

Kevin Gooding formerly from the Honolulu Board of Water Supply was introduced as a new member to the Commission staff that became effective on May 20, 2002. He has a Masters Degree in Geology and will be assuming the title of Assistant State Geologist.

Dean Nakano has been chosen the Department's Manager of the Year. Through his tenure with the Commission, Mr. Nakano has demonstrated superior levels of planning as the Planning Branch Chief. He was very instrumental in spearheading the Commission's drought program and through his efforts, he has brought in federal monies.

The Commissioner from the Bureau of Reclamation will be visiting Hawaii in mid-August. Governor Cayetano will be meeting with him. The Commission is hoping to obtain additional federal funds for our programs.

Item 6 of this meeting's agenda was withdrawn by the applicant/landowner because the property is located within a Special Management Area (SMA). They will need to obtain an SMA permit first.

**7. Eric Jensen, PETITION FOR CONTESTED CASE HEARING, APPLICATION FOR WATER USE PERMIT No. 618, Kaula Kai Irrigation (Well No. 1114-03), TMK 5-1-6:114, Future (Landscape) Use for 11,000 gpd, Kaluako'i Ground Water Management Area, Moloka'i**

PRESENTATION OF SUBMITTAL: Charley Ice

**RECOMMENDATIONS:**

- A. Find that Moloka'i Public Utility, Inc. has standing to request a contested case hearing on the water use permit application of Eric Jensen for the reasonable-beneficial use 11,000 gallons per day of brackish water for landscape from the proposed Kaula Kai Irrigation (Well No. 1114-03).
- B. Direct staff to initiate proceedings for a contested case hearing in this matter, including publishing a notice identifying a deadline for filing written petitions to intervene, and authorize the Chairperson to approve a hearing officer.

**TESTIMONIES:**

Mr. Harold Edwards, Molokai Ranch, stated that there may be some confusion about the level of interest from the applicant in going forward with his application. Mr. Edwards felt that mediation in this matter would be appropriate. He stated that the applicant is probably

not aware of the contested case procedures. Further discussions with the applicant might eliminate the need to go through that procedure.

Mr. Charley Ice spoke to the consultant who has had discussions with Mr. Jensen. To some extent, the consultant has tried to dissuade Mr. Jensen from the burdens of going through a contested case. Mr. Jensen is adamant in proceeding.

MOTION: (RICHARDS/CHING)

To approve the submittal.

UNANIMOUSLY APPROVED.

**8. Application for a Stream Channel Alteration Permit (SCAP MA-334), County of Maui, Department of Public Works and Waste Management, Papaahawahawa Stream, (TMK: (2) 1-5-06: 1 (por) and 1-5-07:01 (por) Hana, Maui**

PRESENTATION OF SUBMITTAL: Ed Sakoda

RECOMMENDATIONS:

That the Commission approve a stream channel alteration permit to replace Papaahawahawa Bridge and build a temporary bypass ford (TMK 1-5-06:01, 1-5-07:01), Hana, Maui. The permit shall be valid for a period of two (2) years subject to the standard conditions for stream channel alteration permits on Exhibit 5, and the following special condition:

“The applicant shall prepare and submit an Archaeological Monitoring Plan to the State Historic Preservation Division (SHPD). The Plan must be acceptable to the SHPD, and prior to construction activities, the applicant shall submit written documentation to the Commission indicating the SHPD’s acceptance of the Monitoring Plan.”

TESTIMONY BY APPLICANT:

Ms. Laura Mau from Wilson Okamoto & Associates representing the County of Maui and Lloyd Yamachika, County Engineer, added that the County is in the process of applying for Army Corps Section 404 permit and a Section 401 water quality certification. Mr. Yamachika also stated that the County is working with SHPD on the monitoring plan.

MOTION: (RICHARDS/NISHIDA)

To approve the submittal.

UNANIMOUSLY APPROVED.

Because Commissioner Nishida recused himself from Items 3, 4 and 5, Chair Coloma-Agaran excused him for the remainder of the meeting (9:28 am).

Deputy Director Nishioka presented approximately 1,000 faxed letters to the Commission opposing staff's recommendation for the following Item 3. Her understanding was that the Earthjustice's national communications office sent out a nationwide alert about this case. To prevent a fax burn out, a screener function on the fax machine was engaged. There was also an attempt to fax another 2,000 letters that were screened out. Some letters came from Hawaii, but mostly from the U.S. mainland and other foreign countries. Deputy Director Nishioka stated that if anyone had interest in examining the letters, they would be available at the Commission office.

**3. Waiahole-Waikane Community Association, Hakipu'u Ohana, Ka Lahui Hawaii, Kahalu'u Neighborhood Board No. 29, and Makawai Stream Restoration Alliance PETITION FOR DECLARATORY ORDER DENYING BISHOP ESTATE'S WATER USE PERMIT APPLICATION FOR FAILING TO COMPLY WITH THE COMMISSION ON WATER RESOURCE MANAGEMENT'S FINAL DECISION AND ORDER IN THE WAIAHOLE DITCH COMBINED CONTESTED CASE HEARING (DEC-OA00-G6)**

**Kamehameha Schools APPLICATION FOR A WATER USE PERMIT, Waiawa Development Tunnel (Well No. 2657-05), TMK 9-6-05:003, Existing/New (Irrigation and Dust Control) Use for 4.2 mgd, Koolaupoko, Kahana, and Waipahu-Waiawa Ground Water Management Areas, Oahu**

PRESENTATION OF SUBMITTAL: Lenore Nakama

AMENDED RECOMMENDATIONS:

Staff recommends that the Commission:

1. Deny the Petition for Declaratory Order. ~~Grant in part and deny in part the Petition for Declaratory Order. The Commission grants the petitioner's request to deny the portion of the water use permit application for quantities greater than 2.22 mgd, which is 1.98 mgd. The Commission denies the petitioner's request to deny the portion of the water use permit application for quantities up to 2.22 mgd, which is 1.98 mgd. This dismissal is without prejudice to KS filing a petition to amend interim instream flow standards for windward streams affected by the Waiahole Ditch.~~
2. Direct staff to publish a notice for a continuance of the public hearing on the ~~remaining portion of KS's~~ water use permit application for ~~2.22~~ 4.2 mgd.

Deputy Director Nishioka informed the Commission that after a thorough check was made, it was found that Commissioners Ching and Dela Cruz have no conflicts of interest and are able to sit on this item.

## TESTIMONIES:

Kapua Sproat, Esq. of Earthjustice (EJ) started by stating that the Windward parties had objected to Commissioner Richards' participation in these proceedings due to a potential conflict of interest. EJ was informed that Commissioner Richards received letters from the State Ethics Commission and the State Attorney General confirming that he did not have a conflict of interest. EJ requested copies of these letters; because they did not receive any, EJ maintained their objection to Commissioner Richards participating on this item.

Ms. Sproat thanked the Commission for the change in meeting date to accommodate EJ's expert witness Dr. Brad Finney to testify at this meeting.

Ms. Sproat urged the Commission to grant the Windward Parties amended petition and issue a declaratory order denying Kamehameha Schools (KS) their application for a water use permit. She stated that the Commissioners are the guardians of the public rights under the public trust.

Ben Kudo, Esq. for KS stated that the reason the water use permit application for this project in Waiawa that was filed 4 years ago was a follow up to the initial decision of this Commission on the Waiahole decision. The Commission denied their application in part because the proper zoning for the lands was not obtained. Two weeks after the decision was rendered by the Commission, Gentry obtained the zoning from the City. The water use permit application was then submitted pursuant to the Commission's decision.

Mr. Kudo stated that the staff's recommendation on the Windward parties' request for a declaratory order is a disguised motion to dismiss. KS feels that it is inappropriate because the petition prematurely requests that the Commission deny their water use application in part prior to the public hearing being closed on this application, before a contested case has even been conducted, and before this Commission has had an opportunity to review the evidence in support of this application. Also, KS feels that if the Commission approves the staff submittal, it would be in error because agency action by the Commission to deny the application without a hearing would constitute a violation of the parties' constitutional due process rights. Mr. Kudo respectfully requested the Commission to complete the public hearing process on the KS application and defer decision on the Windward parties' petition until a contested case hearing is held and evidence has been submitted for consideration.

Mr. Kudo stated that KS objects to staff's submittal in part stating that they must amend the IIFS to take water from Windward streams. KS does not want to take water from the Windward streams. KS only applied for the water that comes from their property which is downstream from the Windward streams. He feels that the water from KS lands, which was allocated for other parties, should be returned. Other waters which are non-permitted, in the agricultural reserve or allocated to other parties, are waters available for KS. He asked the Commission why is it necessary to amend the IIFS of Windward streams when KS is not seeking water from Windward streams? KS wants only the water that is coming from their leeward property.

Mr. Kudo respectfully requested that the Commission adopt KS' position on this matter. He stated that Dr. Finney's alternative study is evidence and should be a part of the contested case. KS would not at this point have an opportunity to cross-examine Dr. Finney. This is a right Mr. Kudo felt that he is afforded under the rules of this Commission.

In conclusion, Mr. Kudo stated that the Commission should defer a decision on this particular petition and close the public hearing, or continue it until such time that the Commission is comfortable to close it, then conduct a contested case so KS can put on the evidence.

Ms. Kapua Sproat briefly noted the Supreme Court decisions in the Waiahole Ditch Contested Case. If the Commission had found that the KS permit application satisfied all the requirements of the law, it could have granted the permit conditioned on KS obtaining the zoning approval. But it didn't do that. In fact, when the Commission denied the application, it specifically said that the estate can reapply "when the need can be demonstrated and the permit condition satisfied". In the interim, the law has been clarified. The Supreme Court has spoken on matters of correlative rights and the unified ditch system. In the August 2000 decision, the Supreme Court specifically found that KS did not have correlative rights. KS filed a motion for reconsideration. In denying KS motion for reconsideration the Supreme Court said "KS has no underlying superior right or entitlement, correlative or otherwise to water from the Waiahole Ditch". Ms. Sproat made note that in the remanded decision and order, the 4.2 mgd has been changed to 3.7 mgd.

Ms. Sproat also addressed the due process concern. The provision in the administrative rules that allows for declaratory ruling (13-157-81, HAR) states that the Commission can make a ruling and does not have to go through the contested case process whenever someone files an inadequate application. Ms. Sproat feels that the Commission has sufficient information now to make a decision.

In answer to Dr. Anderson's question about deferring decision on this petition until after the contested case hearing, and Mr. Kudo's suggestion, Ms. Sproat stated that the harm would be tremendous. This would be extremely difficult especially for community groups like EJ and the Windward parties. The cost to underwrite the proceedings, hire expert witnesses, and to take care of legal pleadings, would be an extremely burdensome and expensive process. She stated that according to the Supreme Court, EJ should not have to be subjected to the contested case hearing process until KS has met that minimum threshold, until they have shown that no possible alternative exist. A contested case hearing would not only affect their community, but it would affect the Commission staff as well.

The following is testimony of expert witness for EJ, Dr. Brad Finney of Humboldt State University.

Dr. Finney used the same analogies as KS, but came up with different conclusions. He stated that the Commission, in keeping with its own rules and ideals should deny the request for the permit until a later date.

KS has made a number of assumptions about their opportunities for water which Dr. Finney believes is incorrect. KS believes they have the opportunity to receive water from the Waiahole Tunnel, 25 mgd, at no cost.

An alternative water source report was prepared at the request of the Commission. The objective in the report was a verifiable cost breakdown of a number of non-potable water alternatives and a detailed analysis of the feasibility. This report was prepared ranging from surface water, ground water and reclamation alternatives against the free water alternatives. The conclusion from the report was that the free water alternative is the preferred alternative; it was the least cost. The purpose of this analysis was to identify several alternatives that could be used with a range of cost and range of implementation difficulties. A couple of the alternatives appeared to be infeasible. The remainder of them could meet the needs of the project. The staff report does not draw any conclusions from the report. The staff recommendations identify some differences of opinion of the cost. It does not seem clear how staff made recommendations to the Commission.

One of the reasons why staff was not able to use the report is because it was based on an assumption of 4.2 mgd of free water being available. Subsequent to that, staff now believes that there may be 2.2 mgd available. So the cost and the alternative analysis that was based on 4.2 mgd are not correct.

One possibility is that KS could change the development so that non-potable water demand could be reduced. This would change the cost of all alternatives. Another possibility would be to add in a supplemental water source to their preferred alternative. This would be possible but would increase the cost of the free alternative. Using the alternative report that was requested by this Commission to draw any conclusions would not be possible.

The second issue is that the population has shown growth. There are 75 mgd unallocated ground water remaining on Oahu. The Commission estimates on the basis of 2-3 mgd. per year. There is approximately 25 years of time that will pass before unallocated groundwater is permitted. This is less than the build out period of this project. The urgency of sound water planning is very clear.

Water resource allocation requires a comprehensive data program in order to characterize the available resources. Although the Commission website states that limited staff are available to carry out this program, the State Water Code recognized this problem and the Commission implemented a comprehensive water resource planning process to help regulate and manage the State's water resources. The process started in 1999 and the Commission has adopted a Statewide Framework for Updating the Hawaii Water Plan.

This permit application for nonpotable water for this large development consists roughly of 12,500 thousand residences or approximately 40 – 50,000 people. The approximate cost of these residences would be about \$4 billion. This development would be in an area that has indications of rapid growth. As recognized by this Commission, planning for development on this scale tends to result in inefficient allocations of water resources. It would be preferable if coordination on potable, nonpotable and wastewater demand of this project could be implemented. This would provide a more cost effective and resource saving alternative.

This project seems like an opportunity to make use of an integrated water resource plan for Oahu. In 1999 the Board of Water Supply (BWS) and the Department of Planning and Permitting and Environmental Services began the process of an integrated resource plan. Unfortunately, this process today is at a standstill. The information would be useful for the Commission if available.

Dr. Finney reviewed the alternative report. Preparation of a review was difficult because a number of data were missing or incomplete. Request for additional information was made for clarification. The response that Dr. Finney received was that the information requested was too detailed than what was available at that time. Dr. Finney found this odd as construction is scheduled to commence in 2003. He stated that he felt the proposal had no substance or the construction schedule is unrealistic.

There are indications within the report that there has been little effort to minimize non-potable water use. It looks like the project was designed to use the amount that is available. There are significant reductions in potable water, with possibly very little change in the nature of the development. Further reductions are possible in non-potable water use during part of the development cycle. The time of the construction alternatives will need to be changed. If land clearing takes about 15 years for homes to develop, some water savings could possibly be made for dust control. If there is a possibility of delaying construction in one of the golf courses until residences were established to make use of the golf course, it would not necessarily reduce the overall net use of water but would change the timing of the water use.

Even if the Waiahole Ditch water is available for free, the cost of the alternatives is either underestimated or they do not include the cost of supplemental water for the Waiahole Ditch alternatives. In other situations, the cost of the alternatives is overestimated. The report did identify a number of alternatives that are reasonable and practical.

The last point focuses on one issue, and that is reuse. The Commission has recognized that time is fast approaching that reclaimed water will supply a significant fraction of the non-potable and perhaps potable water in Hawaii. Sources of reclaimed water are relatively limited. Some examples would be desalination or treating wastewater effluent. The most common source of reclaimed water is treated wastewater. The alternative analysis suggests that several of the reclaimed water alternatives are not practical because it would require irrigation with reclaimed water over a potable aquifer. The alternative report failed to



mention that reclaimed water is used over potable aquifers in many places, and that reclamation projects use reclaimed water to recharge potable aquifers.

Reclaimed water is very popular. There are no reported cases in the United States where reclaimed water supply exceeds demand. The opposite is true. Whenever reclaimed water is available, it is used. Reclaimed water is not free water. There is a cost to treat it but it is cheaper than potable water.

Hawaii has not really embraced the use of reclaimed water over a potable aquifer. One of the reasons is that the wastewater is poorly treated. The ocean has been used as a disposal site. It is not impossible to treat water. If there is adequate monitoring with a high level treatment, and if the protection of the potable resource is assured, the use of reclaimed water would be possible. Regulations with strict standards would need to be implemented. Rules should be made not only to encourage use but also require it. This could possibly solve some of the drought conditions that prevail here.

Because of the water shortage, Dr. Finney stated that not only should the Commission suggest, but require developers to use reclaimed water for non-potable uses. He encouraged the Commission to be the leader in water resources planning in the State. He quoted a slogan of the Florida Department of Environmental Protection for water use, "If water is life, water conservation and reuse must be a way of life."

This is the end of Dr. Finney's testimony.

Councilman Steve Holmes, Honolulu City Council, has represented the Windward area for almost 12 years and this is his last year in public office. He stated that there is an absence of leadership in many areas of the State and policy direction is needed. Sitting in contested case hearings would only benefit attorneys. The City Council has stepped up in their policy rules. Water conservation standards have been adopted. The most used water is for irrigation purposes and not residential or commercial. As Chair of the Public Works Committee, Councilman Holmes is a strong advocate of water reclamation. As policy makers, we need to recognize that the Windward waters are needed for stream restoration and recognize that KS has reasonable alternatives. KS and Gentry can use tax-exempt bond financing to pay for water development costs. The cost would be borne by the eventual users of the project. The developers do not have to come up with the cost up front. There are reasonable policy alternatives.

Councilman Holmes urged the Commission not to continue this process of endlessly fighting this matter out in a contested case hearing.

Chair Coloma-Agaran asked Councilman Holmes if the City Council required the Waiawa by Gentry project to implement reuse.

Councilman Holmes stated that the Council deferred during its discussion to the Water Commission on the reuse issue. He also stated that he voted against the project.

Mr. George Hudes of Makawai Stream Restoration Alliance testified in support of the Windward parties' petition and against the KS water use permit application. He stated that because there is no integrated resource planning for Oahu, water should remain a part of the public trust and KS should look into an alternative source of water for the Waiawa project.

Mr. Fred Madlener, Hawaii's Thousand Friends (HTF), stated that he had hoped this matter of the use of water would be resolved. Water belongs in the streams unless there is an urgent, compelling need to draw it out. HTF suggest the Commission deny the KS application and grant the amended petition.

At 11:02 am, Chair Coloma-Agaran called a 10-minute break. The meeting was resumed at 11:15 am.

Ms. Amy Luersen, Vice Chair of the Kahalu'u Neighborhood Board, requested that the Commission grant the Windward parties the petition and deny the KS request for water because there are alternative sources of water that are available. The stream water is very critical to support native stream life, fishery, and agriculture.

Mr. Charlie Reppun stated that an interim instream flow standard should be set before water can be taken out of a stream, or find an alternative source for the water. Mr. Reppun stated that after working to develop the State Water Code, he thought the Code was designed to prevent contested case hearings. He asked the Commission to take the lead and develop an integrated water resource plan for this area. He asked the Commission to grant the Windward parties the petition and deny the KS application for water.

Mr. Kala Hoe, Hakipu'u Ohana, asked the Commission to grant the Windward parties their petition for declaratory order and deny the KS water use permit application. The application is incomplete because KS did not make an attempt to seek an alternative source. The Commission must plan and coordinate water use to ensure that the water is protected and available for the present and future generations.

Mr. Daniel Bishop, Kalahui Hawaii, Makawai Stream Restoration Alliance, asked the Commission to deny the KS request for any additional water. Mr. Bishop said that he grew up fishing in the Kaneohe area. Since the return of a portion of water to the Waiahole streams, he noticed an increase in the marine life of Kaneohe Bay which indicates a healthier ecosystem. He felt that KS should not build homes for a few people only, but to do something else to help educate children.

Kawai Hoe, Hakipu'u Ohana, who is also a part of KS asked the Commission to deny KS their water use permit application. He stated that the Commission needs to make an important decision in making sure water is available for now and the future.

Liko Hoe, Windward Community College instructor of Hawaiian Studies and Hakipu'u Ohana, stated that taking water from the Waiahole Ditch will affect the ahupuaa in that area. He asked that the ahupuaa be restored.

Mr. Ben Kudo introduced Tom Nance, a hydrogeologist and Roy Abe, a wastewater specialist, who conducted alternative studies for KS as part of the Commission's requirements.

Mr. Nance studied in detail different options: 1) Waiahole ground water options using existing wells onsite; 2) a surface water alternative reactivating Ahren's Ditch; 3) wastewater reuse alternatives.

The range of costs were \$.10 per thousand gallons for the Waiahole Ditch water, \$.72 to \$.78 per thousand gallons for groundwater options; \$.97 per thousand gallons for the Ahren's Ditch option and for Mololo, \$2.08 on the reuse for Wahiawa/Schofield; \$5.14 for onsite wastewater disposal. This meeting is probably not the correct forum to determine the merits of Mr. Nance's analysis versus Dr. Finney's report. Dr. Finney's report is a detailed analysis that is in the form of a contested case exhibit. Mr. Nance feels very comfortable with his cost analysis. In his report, Dr. Finney did not come up with any specific responses to Mr. Nance's report.

Mr. Roy Abe, Civil Engineer at Hawaii Pacific Engineers, is a proponent of reclaimed water. He assisted in promoting a grant for reclaimed water use. Mr. Abe has also worked with the City on various projects in Waimanalo. One alternative looked at was to reactivate the Mililani Treatment Plant. A study for the City and County was conducted. He also advocates the integrated water resources plan. It is long overdue. An option looked into was bringing down the effluent from the Army's Schofield and the City's Wahiawa plants down into Central Oahu, irrigating the Central Oahu parks, Waiawa development, etc. The use of reclaimed water is not that easy. Storage or alternative disposal methods must be considered. When it rains, reclaimed water cannot be used because there is no irrigation demand. Treatment systems are not 100 percent perfect; a back-up disposal method is needed when there are mechanical problems. Most of the wastewater goes to the Sand Island Treatment Plant. One of the problems with the effluent at the Plant is that it is very salty. There is a lot of seawater intrusion into the sewers which make the effluent very salty. The same problem exists with the Navy's Fort Kam Treatment Plant. Honouliuli's salinity levels are better, which is why the City is pushing reclaimed water, using that Plant. Another issue is that the Honolulu Board of Water Supply is finding that desalinated water has potentials and is also cost effective.

Mr. Paul Reppun, farmer in Waiahole, is concerned about the 50,000+ homes that are anticipated to be constructed. He feels that these homes are not affordable but are only to create more jobs. There is a cycle for these people that are purchasing these homes (most of them not from Hawaii). There will be a need to create more jobs for the incoming population. When asked by KS at a meeting previously held on what kind of development would he like to see, Mr. Reppun replied to use the water that is created on site, on that site.

There are many places in Europe that all water that is generated in the building is reused in the same building. It is treated on site and used again on site. Mr. Reppun believes that if reuse is not developed, there will be more problems in the future.

Mr. Calvin Hoe, born and raised in Hakipu'u and lives in Waiahole, is also a graduate of KS. He is in favor of granting the petition for declaratory order and denying KS the water use permit. He stated that it is the responsibility of the Commission to protect the water.

Mr. Don Cooke of Makawai is working with the Division of Aquatic Resources (DAR) staff in preparing preliminary biological stream surveys on the Windward side. Because of the lack of stream flow in the streams, there is very little aquatic life in the habitats that would normally provide food and growth for other aquatic life. He asked the Commission to make the right decision.

Mr. Vincent Dodge of Waianae stated that there is no water management in the Waianae area. The streams that used to run vigorously are now dry. He asked the Commission to challenge KS to be at the forefront of water conservation and stream restoration. He and students from the Waianae Coast go to Waiahole to raise taro. Doing this has given them back the hope of restoring streams on the Leeward side. They are now actively involved in restoring Makaha Stream and watershed. Mr. Dodge encouraged the Commission to take the leadership role in protecting the streams for the children and the future. He encouraged a partnership with KS to do stream restoration. Mr. Dodge would like KS to be the example of this type of development.

A number of students from Waianae gave their experiences of working in streams and asked the Commission to keep the water in the streams.

Mr. Tom Young stated that previous testimonies covered most of the statements he had prepared. The same points had been covered. He added only that once the water is gone, it is gone forever. Once the streams dries, it is gone; no amount of monies can bring it back. He stated that KS should take the lead as proper konohikis would and do all that is possible to educate the children of the new technologies that can help bring our cultural past along into the future.

Mr. John Reppun stated that there is an incredible strategic planning effort that KS is heading. Although one part of that entity is trying to lay claims to what is perceived as rights, another part is working to try and bring out responsibilities. KS is working hard in the Kaneohe Bay area in streamflow restoration. Mr. Reppun stated that instead of working against each other, the Commission could invite everyone involved and create a technical advisory committee and be the leader of discussions and planning. The Commission is the repertory of information. Mr. Reppun asked that the Commission approve the declaratory order and deny KS their water use permit application.

Mr. Alike Lambert, Kalahui Hawaii, asked the Commission to grant the Windward parties their petition and deny the KS application. He feels that KS can find alternative water

sources on the Waiawa lands. He feels that KS should set an example as stewards of the land and not exploit its resources. He reminded KS that its ownership of its land was based on the consent of their forefathers to a land holding system that benefited everyone. In return for allowing the Alii to manage the greater portions of the land, it was understood that the land would be managed to benefit all classes of people, especially those who grew the food that nourished the upper classes. He agrees with the Supreme Court ruling that KS should look for alternative sources of water.

Mr. Reid Yamashiro, Deputy Corporation Council with the City and County of Honolulu, on behalf of the Honolulu Board of Water Supply and the Dept. of Planning and Permitting, addressed the statement in the staff submittal that the City supported the KS water use permit application. Mr. Yamashiro made a correction and stated that the City has no position on the water use application. Under the Water Code, it states that water use comply with the general plans, land use plans and zoning. After commenting on those topics, the City submitted evidence of compliance that shouldn't be construed as the City's supporting the water use permit application. The City has no position on the water use permit application or the Windward parties' petition.

On the issue of correlative rights, the City's position is that the Supreme Court decision established that in water use management areas, the permit provisions of the Code is the existing law which prevails over the common law. The Supreme Court also recognized that existing correlative uses were protected. The Supreme Court found that KS has not provided evidence of existing correlative uses.

Ms. Kat Brady, Assistant Executive Director of Life of the Land, supports the Windward parties' petition and asked the Commission to deny the KS application for water use permit. Life of the Land believes that granting the KS application violates Article IX Section 8 of the Hawaii State Constitution, Preservation of a Healthful Environment, and Article XI Section 1 on conservation, control and development of resources because of the public trust.

Ms. Sharla Manley, Office of Hawaiian Affairs (OHA), supports the amended petition for declaratory order and request denying the KS application because of Native Hawaiian traditional and customary practices that are one of the three protected public trust purposes. KS bears the burden of establishing that their use does not harm or endanger these practices. OHA maintains that KS fails to identify the traditional and customary practices. Even if KS shows that homes, job and recreation areas will be provided, they have not examined the toll the use will exact on Hawaiian culture practices and have not justified its use in relation to these practices, as the law requires. OHA asked the Commission to impose a higher level of scrutiny for the entire request for 4.2 mgd of water from the public trust. Ms. Manley stated that the KS application does not meet the requirements to assess harm to public purposes nor does it exhaustively explore alternatives. OHA feels that the Commission does not have adequate basis upon which to consider the merits of the application; so, therefore the application should be denied.

At 12:50 pm, Chairperson Coloma-Agaran entertained a motion to work through lunch in an Executive Session with questions for the attorney general.

MOTION: (RICHARDS/CHING)  
UNANIMOUSLY APPROVED.

This meeting resumed at 1:25 pm.

Ms. Ilima Morrison, Ka Lahui Hawaii, stated that staff's recommendation granting KS the 2.2 mgd relies on an assumption that contradicts the State Water Code and the Waiahole Decision and Order. Ka Lahui Hawaii believes that the Windward parties should be granted their petition and KS application should be denied. Neither petitioners nor the public should be asked to shoulder the burden of a contested case hearing on this issue.

Mr. Ben Kudo stated that the 4.2 mgd request for the entire Gentry project would not occur until after 4-5 years.

Ms. Pat Liu of Gentry Homes stated that for the initial 4 years of development, approximately 2 mgd non-potable water would be needed. Onsite wells have been drilled for potable water.

Chair Coloma-Agaran asked for a motion and discussion.

MOTION: (RICHARDS/CHING)  
To approve the submittal.

#### DISCUSSION:

Dr. Anderson started by saying that one concern is that staff recommendations assume that the instream flow standards would prevent any additional allocations to KS over the 2.2 mgd they specify. He stated that in theory there is a possibility that other Leeward users who are not using the water may have their allocations redistributed. Therein lies an opportunity for KS to argue the point to reallocate waters that are now being provided to other users, keeping in mind the genesis of the Waiahole CCH, water had been wasted by users in leeward, Oahu. He felt that the rationale behind the staff recommendation, that in order to maintain the interim instream flow standards there would only be that amount available, isn't necessarily a valid approach. Dr. Anderson had concerns about splitting the allocation, which is recommended by the staff. Legally it may be possible, but not in theory. He has concerns about not allowing the process to continue as it relates to the initial permit, despite the merits of the arguments made by KS or the Windward residents. There is a permit in process and the issues are important. The debate on viable alternatives needs to continue as would be the course in due process. At this time to make a decision as to how much water would be available and to try to judge the merits of the case before it is mature is premature. Even if the staff recommends a possible alternative, even that, Dr. Anderson stated, would be premature, given some of the alternatives that may exist.

Dr. Anderson concluded by stating that the staff recommendation is inappropriate at this time.

Commissioner Richards stated that he is in favor of staff's recommendation; Dr. Anderson opposed.

Dr. Anderson stated that arguments on the issue from both sides were very good but he felt that the petition, despite its merits, is premature and made a motion that the petition be denied. Due process should take its course and the Commission should act on the original permit when it is mature and appropriate. Later, the Commission could consider whatever actions to take subsequent to that, as the process would allow. Staff/Commission should expeditiously bring to a close the hearing on the original application for the water use permit.

MOTION: (ANDERSON/DELA CRUZ)

To approve the submittal as amended.

DISCUSSION:

Chair Coloma-Agaran clarified Commissioner Richards's question on Dr. Anderson's motion by stating that the petition would be denied. The permit application would remain, which means that the public hearing process is to be completed. If a contested case is requested and persons who make the request have standing, the Commission would have a contested case and it would still come back to the Commission for a decision. If no contested case were requested, then the Commission would have to make a decision on the water use permit application.

4 – APPROVED AS AMENDED.

(CHAIR COLOMA-AGARAN, DELA CRUZ, CHING, ANDERSON)

1 – OPPOSE (RICHARDS)

**4. Waiahole Ditch Combined Contested Case Hearing, Commission Action on the Report and Recommendation of the Funding Committee for Studies and Monitoring Activities and to Coordinate and Set Up the Mechanism for the Collection, Accounting, and Distribution of Funds**

PRESENTATION OF SUBMITTAL: Mr. Edwin Sakoda

AMENDED RECOMMENDATIONS:

That the Commission approve the following from the Funding Committee Report and Recommendations.

1. That a reasonable amount be established without waiting for final determination of the study scope and costs and that such reasonable amount be set, at a rate of \$0.025 per 1,000 gallons of water used, for the permittees on whose lands the water from the Waiahole Ditch system is used.
2. That except for ongoing stream gaging, the permittee's burden of the cost for science-based studies should terminate upon the establishment of permanent instream flow standards. And further, the attached tables (Tables 1 through 3C) shall serve as guidelines for use and distribution of the funds.
3. That the appropriate Technical Advisory Committees should be reconvened to recommend additional studies when necessary.
4. That ADC should not be required to pay for system losses. However, if system losses exceed the allocation by an amount deemed significant by the Commission, the Commission may, after a hearing on the matter, require payment based on the amount of losses over the allocation.
5. That the Commission staff should collect the funds on a quarterly basis, account for the funds, and distribute the funds. At the end of each quarter (March, June, September, and December), Commission staff should process the data submitted by ADC and send statements to the permittees for payment. The Commission staff will have 30 calendar days from the end of the quarter to prepare and send out the statements. The permittees will have thirty calendar days following receipt of the statements to pay the amounts indicated. If necessary, the Commission staff may request reimbursement up to 5% of the amount collected for accounting and administration expenses.
6. That the Commission should review the "reasonable amount", and accounting and distribution procedures no earlier than two and no later than three years. The USGS and DAR should provide updates of the hydrologic and biologic studies and monitoring activities described in these proceedings.
7. Return to the Commission in 1 year with an update and recommendation on how to establish the interim instream flow standards.

#### TESTIMONIES:

Mr. Manabu Tagomori of KS stated that according to the recommendation there is no time limit to establish the permanent instream flow standards. In some of the technical advisory committee meetings, members cited that there were insufficient data. To make a good recommendation, 10 years of data or studies would need to be collected. Mr. Tagomori asked the Commission to set a time frame or date for staff to establish an interim instream flow standard and the cost related to that.



Mr. Sakoda stated that setting permanent standards statewide would take more than 2-3 years. After 2-3 years we would hopefully have a better idea. Staff could review the entire package in 2-3 years. There is a timetable; it would not go on indefinitely.

Dr. Anderson suggested that staff come back to the Commission in 1 year with a recommendation on how to establish the interim instream flow standards. If aquatic life adopts what the stream flows are, it would be very difficult for the Commission to establish what acceptable aquatic life is in a stream. The cultural issues are very significant. The established practices of what has been used and what is reasonable by way of withdrawals, etc. are probably weighing heavily on the Commission's decision. These issues can be explored and possibly a year from now staff can return to the Commission with a recommendation on how to proceed. At that time, the cost and timeframe might be more viable.

Ms. Kapua Sproat restated the Windward parties request and asked the Commission to order Kunia Water Company to provide EJ the information they had requested earlier. The Windward parties are not opposed to any interim fee schedule. They just want to make sure the schedule has a rational basis.

Mr. Don Cooke has been working as a volunteer in stream studies. There are lots of questions on the type of data to collect and how to interpret that data. The conclusions that are drawn are still preliminary.

MOTION: (RICHARDS/DELA CRUZ)  
To approve the submittal as amended.  
UNANIMOUSLY APPROVED AS AMENDED.

**5. Agribusiness Development Corporation's Request for Extension of Time to Submit an Assessment and Plan for Diverting Tunnel Water into Waikane Stream, December 28, 2001 LEGAL FRAMEWORK, FINDINGS OF FACT AND DECISION AND ORDER, Waiahole Ditch Combined Contested Case Hearing (CCH-OA95-1)**

PRESENTATION OF SUBMITTAL: Mr. Edwin Sakoda

RECOMMENDATIONS:

That the Commission:

1. Extend the deadline for ADC to submit the assessment and plan to the Commission ninety (90) days to June 26, 2002.
2. Require ADC to submit a written report to the Commission on the status of the right-of-entry and a written status report to the Commission at its June 19, 2002 meeting.

At 2:05 pm, Commissioner Ching was excused.

TESTIMONIES:

Mr. Alfredo Lee of Agribusiness Development Corporation (ADC) stated that a right of entry permit was obtained to do the necessary survey. Although there were some rain delays, the survey was completed. The plans should be submitted soon.

Mr. Tom Young gave testimony relating to the previous Item 4. He stated that by putting a time frame on the data collection might be dangerous in that the correct and accurate data may not be obtained.

MOTION: (RICHARDS/DELA CRUZ)

To approve the submittal.

UNANIMOUSLY APPROVED.

Respectfully submitted,

FAITH F. CHING  
Secretary

APPROVED AS SUBMITTED:

LINNEL T. NISHIOKA  
Deputy Director